A CEQA Context for Impact Analysis and Mitigation

Anne Mudge
Morrison and Foerster LLP
on behalf of the
California Wind Energy Association
California Energy Commission
Avian Guidelines Two-day Staff Workshop
September 27, 2006

CEQA and Permits for Wind Projects

- CEQA review is triggered when local agencies approve permits for wind projects.
- CEQA requires disclosure of “significant environmental impacts” and imposition of feasible mitigation.

Three levels of CEQA Analysis

- Exemptions
  - projects that will not have “significant” impacts on the environment.
- Negative Declarations
  - projects that will not have “significant” impacts on the environment because of their design, size or location or if mitigation is imposed.
- EIRs
  - Projects that may have significant impacts on the environment.

Why Determining Significance is Important

- Establishes level of CEQA review.
- Only *significant* impacts require mitigation. (Public Resources Code section 21002.)

Mitigation of Significant Impacts

- Mitigation only required for effects found to be significant. (CEQA Guidelines § 15126.4)
  - Mitigation measure must be roughly proportional to the significant impacts of the project.
  - Mitigation measures must be "feasible."
  - "Feasible": capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." (Public Resources Code section 21061.1)

How CEQA Defines Significant Impacts

- CEQA defines significant effect on the environment:
  - "a substantial, or potentially substantial, adverse change in the environment." (Public Resources Code § 21068.)

What level of bird mortality is considered a "significant impact" under CEQA?

- Depends on the species.
- Mandatory findings of significance triggering need for EIR only where
  - "A project would . . . . *substantially reduce* the number or restrict the range of an endangered, rare or threatened species. (CEQA Guidelines § 15065).

Appendix G criteria for biological significance

- *Substantial adverse* effect, either directly or through habitat modifications, *on any [special status] species.*

- *Interfere substantially* with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites. (CEQA Guidelines Appendix G, IV)

CEQA Significance Requires Species-Level Analysis

- CEQA significance is biological significance.
- Population-level analysis
- Generally, impacts to *individual birds* not significant under CEQA

CEQA and Wildlife Laws

- Even for endangered species, CEQA says that impacts must "substantially reduce the numbers" to require a mandatory finding of significance. (CEQA Guidelines § 15065.)
- Under CEQA, significant impacts are measured at the population/species level.
- For certain species, this could be very few. For others, it could be more than a few.

CEQA and Wildlife Protection Laws

- Regulatory backdrop to the CEQA analysis but do not necessarily determine environmental significance.
- For example, unintended collisions between windmills and individuals of a protected species that do not have population-based impacts does not automatically result in a significant impact under CEQA.
- Compliance with CEQA does not directly address how to reconcile inevitability of some bird mortality with strict liability wildlife laws. That topic still needs further discussion.

Common goal: Encourage wind development but minimize significant impacts.

- Encourage wind and address bird mortality.
- Because it is not possible to reduce bird mortality to zero, focus efforts on projects with significant impacts.
- Look at the big picture: scientists project that global warming may drive 37% of species to extinction by 2050 (Washington Post Jan. 8, 2004)
- Provide incentives and reduce regulatory “red tape” for low impact renewable projects.

A Balanced Approach

- Three pronged approach:
  1. Encourage streamlined CEQA review for certain categories of wind projects with less than significant impacts
  2. Suggest certain standardized review for higher impact projects
  3. Encourage Program EIRs for certain Wind Resource Areas

Why Establish Categories of Low Impact Wind Projects?

- Policy-based incentives for environmentally beneficial projects.
- "Clean power is a key to greenhouse gas-reduction goals."
  - "Power plants are second only to motor vehicles in California as the biggest emitter of carbon dioxide and other gases that cause global warming. "
  - 83% of Californians want government to do more for renewable energy projects. (San Francisco Chronicle, September 24, 2006)

San Francisco Chronicle

"State red tape trips up green energy efforts"

"Despite overwhelming public and political support for renewable power, ratepayer contributions of $319 million, and a 2002 law mandating a dramatic increase in the use of sun and wind to create megawatts, *California has boosted its use of renewable energy by less than 1 percent of the state's overall electricity use in the past four years.*"

San Francisco Chronicle

How Could CEC Guidelines Help?

- Like CEQA Guidelines, CEC Guidelines could suggest categories of wind projects where there could be a presumption of a less than significant impacts.
- "Green" light projects

Examples of CEQA's "green light" approach for certain projects because they are *presumed* to have low impacts.

- Small hydroelectric projects (up to 5 MW) (CEQA Guidelines § 15328)
- Cogeneration projects at existing facilities (up to 50 MW) (CEQA Guidelines § 15329)
- Urban in–fill development (up to 5 acres) (CEQA Guidelines § 15332)
- Pipeline projects up to 1 mile (Public Resource Code § 21080.21; CEQA Guidelines § 15284)

Potential Categories of Wind Projects with Presumed Low Impact

- In-fill projects in established wind resource areas
- Small wind projects
- Larger wind projects in areas with established low bird usage (e.g. Riverside County WRA)
- Replacement/repair/maintenance of existing wind turbines

Oasis Project in Kern County
(60 MW)

Would this mean that all projects in these categories would always be deemed low impact?

- No. Suggested starting place.
- Determination made by counties on a project-by-project basis with site-specific reconnaissance.
- Exceptions to low impact determination where “unusual circumstances” or where project located in “particularly sensitive environment.” (See e.g. CEQA Guidelines section 15300.2.)

Establishing Green Light Projects

- Guidelines could suggest a decision tree analysis for counties that could encourage efficient permitting for low impact wind projects:
  - Does project fit criteria of low impact project?
    - Some level of pre-construction biological analysis would be required to determine whether a project meets criteria.
  - Unusual circumstances?
  - Sensitive area?
  - Other factors?

Second Prong: Suggest Standards for Environmental Review and Mitigation for Higher Impact Projects

- For projects requiring EIRs, for example, develop suggested guidelines for pre-construction and post-construction surveys based on “best management practices” that could be adapted to the individual project.
- Develop menus of potential feasible mitigation measures

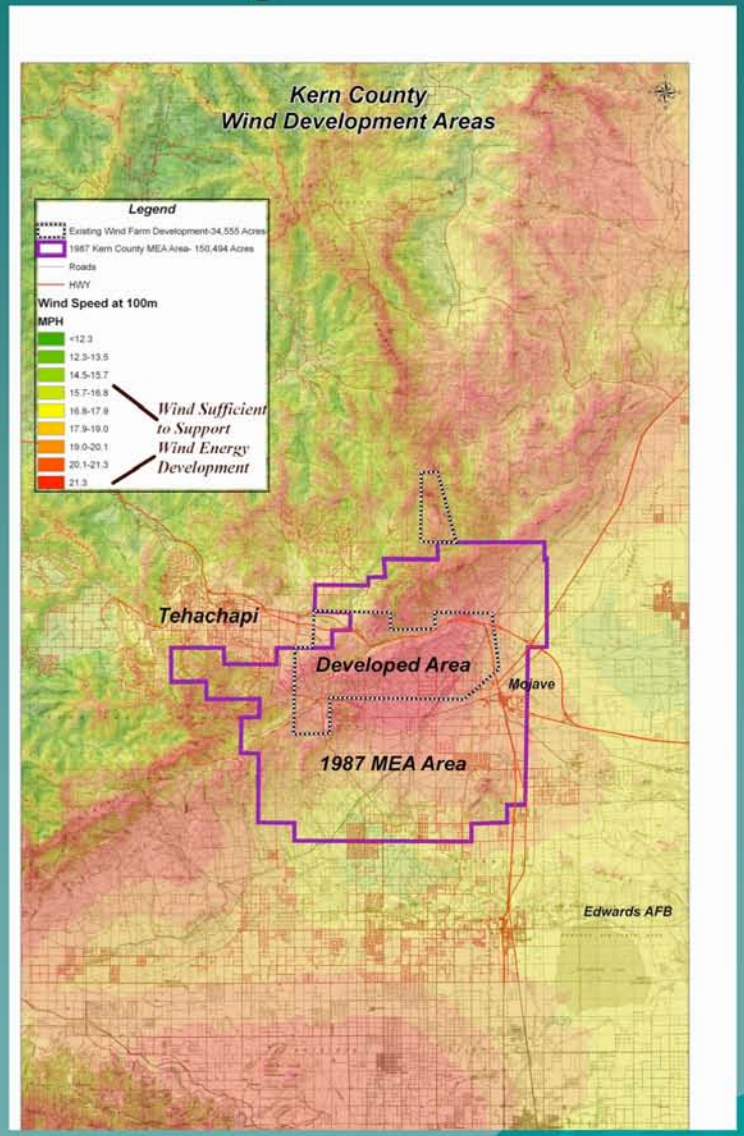
Third Prong: Encourage Tiering of Environmental Analysis

- Tiering of environmental analysis when a body of knowledge already exists
  - CEQA review may incorporate and build on the information of previous EIRS
  - Eliminates repetitive discussions of the same issues
  - Streamlines project permitting but requires mitigation for significant impacts

Program or Master EIR

- Examples:
  - BLM Programmatic EIS for Wind (2005)
  - Solano County Program EIR for Wind Resource Area (1987)
  - Kern County Master Environment Assessment (1987)

MEA Boundary in Kern County



CEC Could Fund Program EIRs To Encourage Wind Development

- Establish consistent standards of significance for impacts to species
- Establish consistent mitigation measures
- Encourage development of wind projects covered in the Program EIR

Practical Advantages to Tiering

- If shown by early biological analysis to be within scope of program EIR, no additional environmental review may be required.
- If additional mitigation outside of that recommended in program EIR needed, use negative declaration or environmental assessment.
- If new significant impacts, supplemental/subsequent EIRs.

Conclusion

- CEC Guidelines could encourage wind and protect birds by:
  - Suggest categories of low impact projects with a presumption of less than significant impacts under CEQA. Counties would determine whether criteria fits on a project basis.
  - For other projects, establish protocol for ensuring that sufficient information is available to make a CEQA decision, including pre-construction surveys as necessary to fill data gaps.
  - Encourage CEC funding for program EIRs.

Comments and Discussion